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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE ROGER T. BENITEZ)

UNITED STATES OF AMERICA, Plaintiff, v. GUILLERMO ALVIZAR-GONZALEZ, Defendant.	CASE NO. 07CR3139-BEN DATE: April 7, 2008 TIME: 2:00 p.m. NOTICE OF MOTIONS AND MOTIONS FOR AN ORDER TO: 1. DISMISS INDICTMENT DUE TO INVALID DEPORTATION; AND 2. GRANT LEAVE TO SUPPLEMENT MOTION.

TO: KAREN P. HEWITT, UNITED STATES ATTORNEY, AND
DAVID KATZ, ASSISTANT UNITED STATES ATTORNEY:

PLEASE TAKE NOTICE that on the above-captioned date and time, or as soon thereafter as counsel may be heard, defendant Guillermo Alvizar-Gonzalez, by and through counsel, Elizabeth M. Barros and Federal Defenders of San Diego, Inc., will ask this Court to enter an order granting the following motions.

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MOTIONS

Defendant Guillermo Alvizar-Gonzalez, by and through his attorneys, Elizabeth M. Barros and Federal Defenders of San Diego, Inc., pursuant to the United States Constitution, the Federal Rules of Criminal Procedure, and all other applicable statutes, case law and local rules, hereby moves this Court for an order to:

1. Dismiss indictment due to invalid deportation; and
2. Grant leave to supplement motion.

These motions are based upon the instant motions and notice of motions, the attached statement of facts and memorandum of points and authorities, and all other materials that may come to this Court's attention at the time of the hearing on these motions.

Respectfully submitted,

/s/ Elizabeth M. Barros

Dated: March 25, 2008

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(HONORABLE ROGER T. BENITEZ)

UNITED STATES OF AMERICA, Plaintiff, v. GUILLERMO ALVIZAR-GONZALEZ, Defendant.	CASE NO. 07CR3139-BEN STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

I.

STATEMENT OF FACTS

Mr. Alvizar immigrated to this country in the early 1980's. During those years he worked in agricultural. Exs. A-B. Mr. Alvizar became a temporary resident on May 3, 1988 and a lawful permanent resident on May 30, 1991. Exs. C-D.

Mr. Alvizar resided in the United States from the time he immigrated in the early 1980's until 2003. During his time in the United States, Mr. Alvizar labored in the fields, formed a family, and raised six United States citizen children. Exs. A-B, L-DD. In fact, the majority of his family resides here in the United States. His wife, Ramona Mercado is a naturalized United States citizen. Ex. X.

In September of 2002, after living in this country for approximately 19 years, Mr. Alvizar was charged in Count One with violating Cal. Health & Safety Code § 11352 (sale/transportation/offer to sell controlled substance) and in Count Two with violating Cal. Health & Safety Code § 11351 (sale of a controlled substance). Ex. J. On January 13, 2003, Mr. Alvizar pleaded nolo contendere to a violation of Cal.

Health & Safety Code § 11352(a). Id. Count Two was dismissed. Id. Based on that conviction, a notice to appear was issued on April 4, 2003, and he was placed in removal proceedings. Ed. F. When interviewed by immigration agents on April 7, 2003, Mr. Alvizar indicated that he wished to have a hearing before an immigration judge to determine whether he could remain in the United States. Ex. G. On April 28, 2003, Mr. Alvizar had a hearing before an immigration judge at which he was ordered removed. Ex. H. At the hearing, the immigration judge ("IJ") asked Mr. Alvizar if he was convicted of Cal. Health & Safety Code § 11352(a).[1] Mr. Alvizar admitted that he was convicted of that charge. No documents were presented at Mr. Alvizar's removal hearing to support the charge. Rather, the IJ ordered him removed based solely on his admission to a conviction under §11352(a). Although the IJ appeared sympathetic to Mr. Alvizar, noting that his removal was a severe sanction, the IJ told him that he was ineligible for any form of relief. It appears that Mr. Alvizar was physically removed from this country that same day. Ex. I.

II.

THE COURT MUST DISMISS THE INDICTMENT BECAUSE MR. ALVIZAR-GONZALEZ'S DUE PROCESS RIGHTS WERE VIOLATED AT HIS REMOVAL HEARING.

Mr. Alvizar must be given the opportunity to collaterally attack his removal. "A defendant charged with illegal reentry under 8 U.S.C. § 1326 has a Fifth Amendment right to collaterally attack his removal order because the removal order serves as a predicate element of his conviction." United States v. Ubaldo-Figueroa, 364 F.3d 1042, 1047 (9th Cir. 2004) (citing United States v. Mendoza-Lopez, 481 U.S. 828, 837-838 (1987)); United States v. Pallares-Galan, 359 F.3d 1088, 1095 (9th Cir. 2004).

Pursuant to 8 U.S.C. § 1326(d), a defendant must demonstrate: 1) that he exhausted all administrative remedies available to appeal the removal order, 2) that the underlying removal proceedings at which the order was issued improperly deprived him of the opportunity for judicial review, and 3) that the entry of the order was fundamentally unfair. 8 U.S.C. § 1326(d). Although Mr. Alvizar believes that the requirements under § 1326(d) conflict with the Supreme Court's decision in Mendoza-Lopez, which was based on the due process clause, Mr. Alvizar nonetheless meets each of the statutory requirements.

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[1] If requested by this Court, Mr. Alvizar will submit a copy of the cassette recording of his removal hearing.

A. Exhaustion of Administrative Remedies and Deprivation of Judicial Review.

Mr. Alvizar is not barred from collaterally attacking the lawfulness of his deportations because he did not have a meaningful opportunity to exhaust his administrative remedies or obtain judicial review of his removal order.

"In a criminal prosecution under § 1326, the Due Process Clause of the Fifth Amendment requires a meaningful opportunity for judicial review of the underlying deportation." United States v. Arrieta, 224 F.3d 1076, 1079 (9th Cir. 2000) (citation omitted). Thus, the exhaustion and judicial review requirements of section 1326(d) cannot bar collateral review of a deportation proceeding when the waiver of the right to an administrative appeal did not comport with due process. Ubaldo-Figueroa, 364 F.3d at 1043 (citing United States v. Muro-Inclan, 249 F.3d 1180, 1189 (9th Cir. 2001), cert. denied, 534 U.S. 879 (2001)).

A waiver does not comport with due process if it is not considered and intelligent. Id; see also Mendoza-Lopez, 481 U.S. at 840 ("Because the waivers of their rights to appeal were not considered or intelligent, respondents were deprived of judicial review of their deportation proceeding."). An alien's waiver of his right to appeal his deportation order is not considered and intelligent where the record contains an inference that the petitioner is eligible for relief from deportation, but the IJ fails to advise the alien of the possibility. Id. at 1049. Moreover, it is the government's burden to establish by "clear and convincing evidence," Gete v. INS, 121 F.3d 1285, 1293 (9th Cir.1997), that the waiver is "considered and intelligent." United States Lopez-Vasquez, 1 F.3d 751, 753-54 (9th Cir. 1993) (en banc); see also United States v. Gonzalez Mendoza, 985 F.2d 1014, 1017 (9th Cir. 1993) (finding a due process violation where immigration judge failed to inquire whether right to appeal was knowingly and voluntarily waived).

As explained in greater detail below, at the time of his 2003 removal, Mr. Alvizar was eligible for cancellation of removal under 8 U.S.C. § 1229b(a) as well as "fast-track" voluntary departure under 8 U.S.C. § 1229c(a)(1). Nonetheless, the IJ explicitly and incorrectly advised Mr. Alvizar that he was ineligible for any form of relief. Thus, as in Ubaldo-Figueroa, 364 F.3d at 1049-50, Mr. Alvizar is exempt from the exhaustion and judicial review requirements of § 1326(d).

B. "Fundamentally Unfair" and "Prejudice"

A removal order is "fundamentally unfair" if: 1) the defendant's due process rights were violated by defects in the removal proceedings, and 2) the defendant suffered prejudice as a result of the defects.

Ubaldo-Figueroa, 364 F.3d at 1048; United States v. Garcia-Martinez, 228 F.3d 956, 960 (9th Cir. 2000) (citation omitted).

1. Mr. Alvizar's Due Process Rights Were Violated Because He Was Not Advised of His Eligibility for Relief Under 8 U.S.C. § 1229b(a) ("Cancellation of Removal for certain permanent residents").

In order to qualify for cancellation of removal, an alien must show that he has been an alien lawfully admitted for permanent residence for 5 years, that he resided continuously in the United States for 7 years after having been admitted in any status, and that he has not been convicted of an aggravated felony. 8 U.S.C. § 1229b(a)(1)-(3). At the time of his removal hearing, Mr. Alvizar had resided in the United States continuously for approximately 19 years and had been admitted in any status for approximately 15 years. Moreover, it was well-established law in the Ninth Circuit that a conviction under Cal. Health & Safety Code §11352 is not categorically an aggravated felony. See United States v. Rivera-Sanchez, 247 F.3d 905 (9th Cir. 2001) (en banc) (holding that a conviction under § 11352 is not categorically an aggravated felony). Therefore, Mr. Alvizar had plausible grounds for relief.

Where an alien has been convicted of an offense that is not categorically an aggravated felony, the immigration court must proceed to the modified categorical approach established by the Supreme Court in United States v. Taylor, 495 U.S.575 (1990). See e.g., Kawashima v. Gonzales, 503 F.3d 997, 1001-1002 (9th Cir. 2007) ("Upon this examination, we ask 'whether there is sufficient evidence to conclude that the alien was convicted of the elements of the generically defined crime even though his or her statute of conviction was facially overinclusive.'"). For example, in Ruiz-Vidal v. Gonzales, 473 F.3d 1072, 1075 (9th Cir. 2007), Mr. Ruiz-Vidal was charged, as was Mr. Alvizar, with being deportable for conviction of a controlled substance offense. The administrative record contained only two documents: a charging document listing the controlled substance as methamphetamine, and an abstract of judgment indicating that he pleaded guilty to a violation of Cal. Health & Safety Code § 11377(a), describing the conviction as "Possess Controlled Substance." Id. at 1127. The Ninth Circuit held that the government failed to prove that Mr. Ruiz-Vidal's conviction qualified as a controlled substance offense. Id.

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The Ninth Circuit explained -

> We are thus left only to speculate as to the nature of the substance. But speculation is not enough. "[W]hen the documents that we may consult under the 'modified' approach are insufficient to establish that the offense the petitioner committed qualifies as a basis for removal ... we are compelled to hold that the government has not met its burden of proving that the conduct of which the defendant was convicted constitutes a predicate offense, and the conviction may not be used as a basis for removal."

Id. at 1079 (quoting Tokatly v. Ashcroft, 371 F.3d 613, 620-21 (9th Cir. 2004)). The Ninth Circuit also ruled that a remand, which would allow the government to supplement the administrative record, was inappropriate. Id. at 1180. Accord Kawashima, 503 F.3d at 1004 ("The government contends that we must remand to afford it another opportunity to compile a record of conviction. . . our precedents clearly establish the limited number of documents a court may consider under the modified categorical approach. In such a case, the government should not have a second bite at the apple.").

In this case, the minute order (which is the only document other than the complaint that the government has produced), indicates that Mr. Alvizar pleaded nolo contendere to the § 11352(a) charge. The government has not turned over any evidence indicating what facts, if any, Mr. Alvizar admitted and there are no documents in the administrative record because no documents were ever presented to the IJ at the time of his removal hearing. Nonetheless, Mr. Alvizar was affirmatively told by the IJ that he was not eligible for relief at his removal hearing, thus establishing that his due process rights were violated. Ubaldo, 364 F.3d at 1050 ("[f]ailure to so inform the alien [of his or her eligibility for relief from removal] is a denial of due process that invalidates the underlying deportation proceeding.").

2. Mr. Alvizar Suffered Prejudiced Because He Had a Plausible Argument that His Conviction Did Not Constitute a Controlled Substance Offense, He Has Plausible Grounds for Cancellation of Removal Under 8 U.S.C. § 1229b and "Fast Track" Voluntary Departure Under 8 U.S.C. § 1229c.

To prove prejudice, Mr. Alvizar need not show that he actually would have been granted relief; rather, he must show only that he had a "plausible" basis for seeking relief from deportation. Arrieta, 224 F.3d at 1079; Ubaldo-Figueroa, 364 F.3d at 1050. As the Ninth Circuit has explained, prejudice means that "the outcome of the proceedings *may have been affected* by the alleged violation." Zolotukhin v. Gonzales, 417 F.3d 1073, 1076 (9th Cir. 2005) (emphasis in original). "The standard does not demand absolute certainty; rather prejudice is shown if the violation '*potentially* . . . affects the outcome of the proceedings.'" Id. at 1077 (citing Agyeman v. INS, 296 F.3d 871, 884 (9th Cir. 2002)) (emphasis in original). For example, in Zolutukhin, the government argued that the petitioner lacked good character and thus would not have been able to prevail on his claims. Id. The Ninth Circuit rejected this argument, noting that "even a petitioner with purportedly bad character and possibly a weak case has a right to a fair hearing." Id. Because the outcome of the case may have been different absent the due process violations, the case was remanded for a new hearing. Id.

Mr. Alvizar had a plausible basis for seeking relief. First, he had a plausible argument under Ruiz-Vidal, 473 F.3d 1072 (discussed above), that his conviction did not qualify as a controlled substance offense. However, even if it was determined that his conviction constituted a controlled substance offense, a conviction under § 11352(a) is not categorically a drug trafficking offense, and thus, not categorically an aggravated felony. Because his conviction was not categorically an aggravated felony, it is possible he could have obtained cancellation of removal under § 1229b or voluntary departure under § 1229c. Therefore, Mr. Alvizar suffered prejudice.

Although there are negative equities stemming from Mr. Alvizar's alleged conviction, his favorable equities are substantial. See, e.g., Georgiu v. INS, 90 F.3d 372 (9th Cir.1996) (balancing the positive and negative equities to evaluate the plausibility of petitioner's claim for discretionary relief from deportation under Section 212(c) of the former INA). At the time of his removal, Mr. Alvizar had lived in the United States for 19 to 20 years, he had been a resident for approximately 15 years and a permanent resident for approximately 13 years. See Pablo v. INS, 72 F.3d 110, 113 (9th Cir.1995) (listing "residence of long duration in this country" as a factor to be considered in determining whether to grant discretionary relief). Further, his family members were legal residents or citizens of the United States, they resided in the United States, and supported his desire to stay here. See id. (listing "family ties" in the U.S. as a positive factor to be considered). In short, there are significant positive equities that weigh in favor of Mr. Alvizar's claim for discretionary relief from deportation. Given the equities, it is plausible that an immigration judge would have granted him relief. Therefore, the indictment must be dismissed.

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III.

MOTION FOR LEAVE TO SUPPLEMENT MOTION

Defense counsel is still in the process of obtaining evidence in support of this motion. Therefore, counsel requests the opportunity to supplement this motion at the hearing on this matter.

IV.

CONCLUSION

For the foregoing reasons, Mr. Alvizar respectfully requests that this Court grant the above requested motion and leave to supplement this motion.

Respectfully submitted

Date: March 25, 2008

/s/ Elizabeth M. Barros
ELIZABETH M. BARROS
Federal Defenders of San Diego, Inc.
Attorneys for Mr. Alvizar